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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

10 Plaintiff,

11 v.

12 Chester Wayne Wilson,

13 Defendant.
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No. CR-15-02231-001-TUC-CKJ (LCK)

ORDER

15 On November 19, 2015, Drug Enforcement Agency (DEA) agents arrested
16 Defendant for possession of methamphetamine for distribution. The arrest was made at
17 the FedEx Shipping facility located at 3601 E. Columbia Street, Tucson, Arizona, and the
18 Agents were there to intercept a package containing methamphetamine that Florida
19 agents said was intended to be mailed by Defendant to Panama City, Florida that
20 afternoon. On December 16, 2015, Defendant was indicted for Possession With Intent to
21 Distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. 841(a)(1)
22 and 841(b)(1)(B)(viii). (Doc. 8).

23 Defendant filed a Motion to Suppress Statements and a Motion to Suppress Fruits
24 of Illegal Seizure. (Docs. 29, 30). Evidence and argument were heard on July 18, 2016,
25 and August 17 and 19, 2016 before Magistrate Judge Lynette C. Kimmins. On September
26 7, 2016, Magistrate Judge Kimmins issued a Report and Recommendation (R & R),
27 recommending denial of the Motions. (Doc. 69.) The R & R advised that pursuant to
28 Federal Rule of Criminal Procedure 59(b)(2), any party may serve and file written

1 objections within 14 days of being served with a copy of the R & R. (*Id.*) No objections
2 were filed, and on October 7, 2016, this Court adopted the R & R and denied Defendant's
3 Motions. (Doc. 72.) Thereafter, The Court granted Defendant's Motion to Extend Time
4 to File Objections to the Magistrate Judge's Report and Recommendation (Doc. 79) and
5 vacated its prior Order adopting the R & R. (Docs. 79, 83.) Defendant has now filed his
6 objections, and the Government filed its response. (Docs. 84, 88.) Defendant's
7 objections relate only to the Motion to Suppress Fruits of Illegal Seizure and consent to
8 search the package.

9 The Court has reviewed the Motion to Suppress Statements and the Motion to
10 Motion to Suppress Fruits of Illegal Seizure (Docs. 29, 30), the government's responses
11 (Docs. 37, 38), the R & R (Doc. 69), the hearing transcripts from July 18, 2016 (Doc. 84,
12 Ex.1), and August 17 and 19, 2016 (Docs. 68, 81), Defendant's objections to the R & R
13 (Doc. 84), and the government's response (Doc. 88), and Defendant's reply (Doc. 89).

14 The Court will adopt the R & R with respect to the Motion to Suppress Statements
15 and deny the Motion. The Court will also adopt the R & R with respect to the finding of
16 consent to search the package and need not reach the issue of probable cause for the
17 warrantless search. Therefore, the Court will deny the Motion to Suppress Fruits of
18 Illegal Seizure.

19 **I. Background**

20 The seizure of the package and arrest of Defendant were the result of cooperation
21 between Arizona-based DEA agents and Florida-based DEA Agents Bell and Key in
22 Panama City, Florida. It is undisputed that the Arizona DEA Agents had no warrant to
23 seize the package. The Magistrate Judge found, *inter alia*, that the Tucson Agents had
24 probable cause to seize the package and that Defendant gave his consent to the search of
25 the package.

26 Defendant objects to the Magistrate Judge's findings on two grounds: (1) the
27 Magistrate Judge improperly limited the probable cause inquiry to information and
28 evidence obtained after the Arizona DEA Agents received Defendant's identity from the

1 Florida DEA Agents; i.e. she refused to allow inquiry into how the Florida DEA Agents
 2 initially determined Defendant's identity; and (2) the Magistrate Judge improperly found
 3 that Defendant had consented to the opening of the package.¹ (Doc. 84 at 5, 10.)

4 The evidence leading to Defendant's arrest is adequately set forth in the R & R.
 5 (Doc. 69 at 2-3.) Because the Court finds that Defendant gave his consent for the search
 6 of the package, the Court need not reach the issue of probable cause and will not further
 7 discuss the facts related to that issue.

8 On November 19, 2015, Arizona DEA agents had a FedEx shipping facility under
 9 surveillance, and when the Defendant arrived and handed a package to Shane Karwoski
 10 to mail at the FedEx, Defendant and Mr. Karwoski were both arrested. After Defendant's
 11 arrest, he participated in an unrecorded interview. Defendant acknowledged signing a
 12 Recording Declination form. (Govt's Exhibit 1). Defendant testified that he did not
 13 consent to the opening of the package taken from Shane Karwoski at the time of the
 14 arrest. The Government presented evidence (Govt's Exhibit 2) of Defendant's consent to
 15 search his phone, which the Defendant claims he did not sign. Defendant asserts that the
 16 signature on the consent form does not match the signature on the Recording Declination
 17 form. (Doc. 84 at 4.) The Magistrate Judge found Defendant's statement that the package
 18 was not his was not credible and, for the same reason, found Defendant's testimony that
 19 he did not consent to a search of the package not credible. (Doc. 69 at 9.)

20 **II. Legal Standards**

21 **A. Review of R & R**

22 The Court reviews *de novo* the objected-to portions of the Report and
 23 Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The Court reviews for
 24 clear error the unobjected-to portions of the Report and Recommendation. *Johnson v.*
 25 *Zema Systems Corp.*, 170 F.3d 734, 739 (7th Cir. 1999); *see also, Conley v. Crabtree*, 14
 26 F.Supp.2d 1203, 1204 (D. Or. 1998).

27
 28 ¹ Defendant does not object to the R & R with respect to the findings relevant to
 the Motion to Suppress Statements.

1 **B. Consent to the search**

2 Under the Fourth and Fourteenth Amendments, a search made without a warrant
3 supported by probable cause is “per se unreasonable . . . subject only to a few specifically
4 established and well-delineated exceptions.” *Schneckloth v. Bustamonte*, 412 U.S. 218,
5 219 (1973), *quoting Katz v. United States*, 389 U.S. 347, 357, 88 (1967). One of those
6 exceptions to the warrant and probable-cause requirement is a search conducted pursuant
7 to consent. *Bustamonte*, 412 U.S. at 219. Defendant does not dispute the legal standard
8 set forth by the Magistrate Judge in the R & R:

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10 In order for the prosecution to demonstrate that consent was voluntarily
11 given, courts look at the totality of the circumstances surrounding the
12 acquisition of consent. [*Bustamonte*, 412 U.S.] at 223. Some of the factors
13 taken into account have included “youth of the accused; or his low
14 intelligence; his lack of education; the lack of any advice to the accused of
15 his constitutional rights; the length of detention; the repeated and prolonged
16 nature of questioning; and the use of physical punishment such as
17 deprivation of food or sleep.” *Id.* at 226.

18 (Doc. 69 at 9.)

19 **III. Motion to Suppress Fruits of Illegal Seizure**

20 Defendant seeks an order suppressing the search of the FedEx package, arguing
21 that it was illegal because it was without a warrant or probable cause and arguing, in his
22 reply, that no valid consent was given. (Doc. 41 at 3-4.)

23 **A. The standing ruling was not clearly erroneous**

24 Defendant told agents that he could not give permission for a search of the
25 package because it was not his. Nevertheless, the Magistrate Judge found Defendant had
26 standing because his testimony disavowing ownership of the package was not credible;
27 Defendant had an ownership interest in the package.

28 Defendant does not object to this but the Government in its response points out
that Defendant has made competing arguments. (Doc. 89 at 3.)

1 **B. The totality of the circumstances demonstrate consent to the search**

2 The R & R found the following facts regarding consent to the search:

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4 SA Chicas testified that shortly after reading Wilson his Miranda rights and
5 beginning the interview, he asked Wilson if he would consent to a search of
6 the package. According to SA Chicas, Wilson verbally consented to the
7 search. In contrast, Wilson testified that he told the agents he could not
8 consent because it was not his package. Wilson does not argue that his
9 consent to a search of the package was involuntary; rather, he contends he
10 did not consent to a search under any circumstances. Indeed, there is no
11 evidence that consent, if given, was involuntary. It is undisputed that
12 Wilson was advised of his Miranda rights, had experience as an adult with
13 the criminal justice system, was detained and questioned for only a short
14 period of time before consent was requested, and was not subject to any
15 physical punishment or deprivation.

16 (Doc. 69 at 9.)

17 The Magistrate Judge also noted that the Court had already found Defendant not
18 credible when he testified at the hearing that the package was not his and reasoned that
19 “[f]or the same reasons, the Court finds not credible his testimony that he did not consent
20 to a search of the package.” (*Id.*)

21 Defendant objects to the finding of consent, arguing that even if the Magistrate
22 Judge did not believe Defendant when he claimed the package was not his, it does not
23 follow that Defendant would consent to the agent opening the package. (Doc. 84 at 11.)
24 Defendant claims that the weight of the evidence is against the finding of consent. He
25 claims that Agent Chicas testified that the Defendant verbally consented to agents
26 opening the package (R.T. 7/18/16 at 47-48) but could not say how the Defendant gave
27 such consent. Agent Chicas said it was possible that when asked if he could open the
28 package, the Defendant told him “The package is not addressed to me” (*id.* at 58), but
29 when pressed further, he became sure that the Defendant said something along the lines
30 of “Go ahead and open it.” (*Id.*) But Agent Chicas also testified that no consent to search
31 form was signed because a verbal consent was sufficient. (R.T. 8/17/16 at 65-66.)
32 Defendant points out that in contrast, he was required to sign a Recording Declination,

1 and according to Agent Chicas, a Consent to Search related to Defendant's cell phone.
2 (R.T. 7/18/16 at 46, 48.) Defendant argues that the agent's claims to have overlooked the
3 written consent "strains credulity." (Doc. 84 at 11.)

4 Defendant does not claim that his consent was involuntary; rather he claims he did
5 not give consent. The test for voluntariness is the "totality of the circumstances" in
6 obtaining consent. The Magistrate Judge considered that Defendant had adult experience
7 with the criminal justice system and had knowingly waived his *Miranda* rights. Further,
8 "he agreed that when the agents told him he had been under surveillance for a period of
9 time for shipping the methamphetamine to Florida, he said 'What took you so long?'"
10 (Doc. 69 at 9.) In other words, as the R & R finds, Defendant "did not decline to
11 participate in the interview or wholly deny involvement." (*Id.*) The Magistrate Judge
12 also had the opportunity to observe the demeanor of the witnesses testifying at the
13 evidentiary hearing and found Defendant not credible. The Court finds that Defendant
14 consented to a search of the package. Because the Court finds consent, the agents did not
15 need probable cause or a warrant.

16 In sum, the Court overrules Defendant's objections.

17 IT IS ORDERED:

18 (1) The R&R entered on September 7, 2016 (Doc. 69) is ADOPTED.

19 (2) The Motion to Suppress Statements (Doc. 29) and the Motion to Suppress
20 Fruits of Illegal Seizure (Doc 30) are DENIED.

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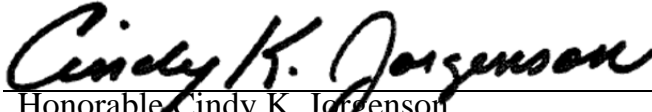
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1 (3) The Court affirms the trial date of December 13, 2016 at 9:00 a.m.
2 before the Hon. Cindy K. Jorgenson.

3 (4) A Status Conference is set for December 12, 2016 at 11:30 a.m.

4 (5) The deadline for filing proposed jury instructions and voir dire is noon
5 on December 7, 2016.

6 Dated this 2nd day of December, 2016.

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8 
9 Honorable Cindy K. Jorgenson
10 United States District Judge
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